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12 **UNITED STATES DISTRICT COURT**

13 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

14 CITY OF LOS ANGELES,

15  
16  
17 Plaintiff,

18  
19 v.

20  
21 MATTHEW G. WHITAKER,  
22 Acting Attorney General, *et al.*,

23  
24 Defendants.

Case No. 2:18-cv-07347-R-JC

**DEFENDANTS' NOTICE OF  
MOTION AND MOTION FOR  
PARTIAL DISMISSAL OR PARTIAL  
SUMMARY JUDGMENT; MEMO-  
RANDUM OF POINTS AND  
AUTHORITIES; OPPOSITION TO  
PLAINTIFF'S MOTION FOR  
PARTIAL SUMMARY JUDGMENT  
OR PRELIMINARY INJUNCTION**

Date: January 7, 2019

Time: 10:00 a.m.

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1                   **NOTICE OF MOTION AND MOTION TO DISMISS**  
2                   **OR FOR SUMMARY JUDGMENT**

3           PLEASE TAKE NOTICE that on Monday, January 7, 2019, at 10:00 a.m., or  
4 as soon thereafter as counsel may be heard, before The Honorable Manuel L. Real,  
5 in Courtroom 880 on the Eighth Floor of the Edward R. Roybal Federal Building  
6 and United States Courthouse, 255 East Temple Street, Los Angeles, the defendants  
7 will move, and hereby do move, for partial dismissal of this action under Rules  
8 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, or, alternatively, for  
9 partial summary judgment under Rule 56 of the Federal Rules of Civil Procedure.  
10 Defendants seek dismissal or judgment as to (1) all of plaintiff's claims regarding  
11 the Fiscal Year 2018 Gang Suppression Planning Grants Program, and (2) plaintiff's  
12 challenges to the public-disclosure condition and the requirement to provide  
13 information regarding the applicant's laws and policies in the FY 2018 Edward  
14 Byrne Memorial Justice Assistance Grant Program.

15           This motion is based on the following Memorandum of Points and  
16 Authorities, Defendants' Request for Judicial Notice, the "Statement of Uncontro-  
17 verted Facts in Support of Defendants' Motion for Partial Summary Judgment;  
18 Response to Plaintiff's Statement of Facts," the evidence and records on file in this  
19 action, and any other written or oral evidence or argument that may be presented at  
20 or before the time this motion is heard by the Court.

21 Dated: November 13, 2018

22                                   Respectfully submitted,

23                                   JOSEPH H. HUNT  
24                                   Assistant Attorney General

25                                   NICOLA T. HANNA  
26                                   United States Attorney

27                                   JOHN R. TYLER  
28                                   Assistant Director

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/s/ W. Scott Simpson

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COUNSEL FOR DEFENDANTS

## MEMORANDUM OF POINTS AND AUTHORITIES

### INTRODUCTION

Law enforcement in this country is a cooperative endeavor. Unlawful acts often implicate the jurisdiction of more than one agency, and thus local, state, tribal, and federal officials work together in a variety of ways to fight crime and ensure public safety. Unfortunately, plaintiff rejects this proposition. It prefers to release into the community aliens it saw fit to arrest for criminal violations rather than sharing law enforcement-related information with the Federal Government that might lead to immigration enforcement against those individuals. That the Department of Justice (“Department”) would expect basic cooperation when it gives out federal funds should be unsurprising. When Congress created the Department’s primary grant-making component, the Office of Justice Programs (“OJP”), it made a specific finding that “law enforcement efforts must be better coordinated, intensified, and made more effective at all levels of government.” Pub. L. No. 90-351, 82 Stat. 197 (1968). The grant requirements challenged in this case all reflect a very basic application of this important principle – the ability of one law enforcement agency to obtain relevant information from and take custody of those held by another law enforcement agency. This basic type of cooperation is specifically contemplated by the Immigration and National Act (“INA”) and fully consistent with the grant programs at issue here.

Los Angeles challenges certain program requirements in the Fiscal Year 2018 Gang Suppression Planning Grant (“Gang Suppression”) and the Edward Byrne Memorial Justice Assistance Grant Program (“Byrne JAG Program”). The City challenges these requirements under the Separation of Powers, the Spending Clause, the Tenth Amendment, and the Administrative Procedure Act. Plaintiff mistakes the nature of these grants and their requirements, and is not entitled to the relief it seeks.

This Court has previously considered certain conditions on the Byrne JAG formula grant program from the previous fiscal year. Defendants respectfully

1 disagree with the Court's holdings in that case, and hereby reiterate, incorporate, and  
2 preserve for further review the arguments they made therein.<sup>1</sup> But, as explained  
3 below, the Court need not revisit its rulings in order to reject the full relief plaintiff  
4 seeks here.

5 First, the Gang Suppression grant is a new program that the Department  
6 created this fiscal year to address gang violence including, especially, transnational  
7 gangs; it is a discretionary grant that works differently from the Byrne JAG grant this  
8 Court considered earlier this year. The funds for this competitive program come  
9 from a lump sum appropriation, giving the Department exceedingly broad authority  
10 to determine how these funds should be spent. *Lincoln v. Vigil*, 508 U.S. 182, 192  
11 (1993) (“[T]he very point of a lump-sum appropriation is to give an agency the  
12 capacity to adapt to changing circumstances and meet its statutory responsibilities in  
13 what it sees as the most effective or desirable way.”); *see* 28 U.S.C. § 530C(a)(4)  
14 (authorizing the Attorney General to carry out Department activities “through any  
15 means, including . . . through . . . grants”). Recognizing the role of the Department  
16 of Homeland Security (“DHS”) in combatting transnational gangs, the Department  
17 expects grant recipients to provide access and information to DHS about criminal  
18 aliens in their criminal custody.

19 Second, plaintiff challenges aspects of both grants that have not previously  
20 been addressed. In relation to both the Gang Suppression program and the Byrne  
21 JAG Program, plaintiff also challenges a question in the grant application related to  
22 an applicant's information-sharing policies. This is not an award condition, and the  
23 Department has considerable discretion in crafting its grant applications. Indeed,  
24 Byrne JAG applicants must submit an application “in such form as the Attorney  
25 General may require.” 34 U.S.C. § 10153(a).

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26 <sup>1</sup> *See Los Angeles v. Whitaker*, No. 2:17-cv-07215-R-JC (C.D. Cal.), Dkt.  
27 Nos. 86, 89. Defendants will not discuss at length herein certain FY 2018 grant  
28 conditions that are very similar to FY 2017 conditions that this Court has already  
enjoined.

1 Plaintiff also challenges a prohibition in both grants on publicly disclosing  
 2 information obtained through law enforcement channels for the purpose of frustrating  
 3 law enforcement operations. The purpose of such a requirement is obvious: if law  
 4 enforcement partners at various levels of government are going to work together to  
 5 address public safety, they must be free to share information without fear that the  
 6 information will be misappropriated and misused. OJP's authority to include this  
 7 condition is clear: it is authorized to "maintain liaison with . . . State governments in  
 8 matters relating to criminal justice." 34 U.S.C. § 10102(a)(2).

9 Finally, plaintiff challenges FY 2018 requirements calling for compliance with  
 10 two federal laws, 8 U.S.C. §§ 1373 and 1644. Those laws preclude local policies that  
 11 bar the sharing of immigration-related information. Los Angeles did not challenge  
 12 this condition with respect to the FY 2017 grant, but does so now. This requirement  
 13 is authorized by the Department's authority to require compliance with all "appli-  
 14 cable Federal laws," *id.* § 10153(a)(5)(D), to place "special conditions on all grants,"  
 15 and to determine "priority purposes for formula grants," 34 U.S.C. § 10102(a)(6).

16 For these reasons, all of plaintiff's claims should be dismissed or judgment  
 17 should be entered for the defendants on those claims and challenges, and plaintiff's  
 18 motion for partial summary judgment or preliminary injunction should be denied.<sup>2</sup>

## 19 **STATUTORY AND ADMINISTRATIVE BACKGROUND**

### 20 **I. The Immigration and Nationality Act**

21 Enforcement of the immigration laws, including and especially the investiga-  
 22 tion and apprehension of criminal aliens, is quintessentially a law enforcement  
 23 function. The INA gives the Executive Branch considerable authority and discretion  
 24 to conduct and direct immigration enforcement pursuant to federal policy objectives.  
 25 *See Arizona v. United States*, 567 U.S. 387, 396-97 (2012). For example, federal  
 26

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27 <sup>2</sup> As noted at note 6 *infra*, plaintiff's claims regarding the custody condition,  
 28 the interview condition, and the information condition on FY 18 Byrne JAG grants  
 should be stayed because they are already subject to a permanent injunction.

1 immigration authorities are empowered, “without warrant . . . to interrogate any alien  
2 or person believed to be an alien as to his right to be or to remain in the United  
3 States,” 8 U.S.C. § 1357(a)(1), and the governing regulations authorize conducting  
4 such interrogation “anywhere in or outside the United States,” 8 C.F.R. § 287.5(a)(1).

5 Several outcomes and federal agency responsibilities under the INA turn on  
6 the existence and timing of local or state criminal proceedings against aliens. For  
7 example, the INA provides that aliens who have committed certain classes of crimes  
8 – whether federal, state, or local – shall be removed from the United States upon  
9 order of the Attorney General or the Secretary of Homeland Security. *See, e.g.*, 8  
10 U.S.C. § 1227(a)(2). Among other things, an alien convicted of an “aggravated  
11 felony” is deportable, as is an alien “convicted of two or more crimes involving  
12 moral turpitude, not arising out of a single scheme of criminal misconduct.” *Id.*  
13 § 1227(a)(2)(A)(ii), (iii). Further, if an alien has been convicted of a certain subset of  
14 the crimes listed, the INA *requires* the Attorney General or Secretary to take custody  
15 of the alien “when the alien is released” from criminal custody. *Id.* § 1226(c)(1).  
16 Once an immigration judge has ordered the removal of an alien, the alien must be  
17 removed from the country within 90 days, *id.* § 1231(a)(1); *see id.* § 1229a, except  
18 (among other exceptions not relevant here) that an alien sentenced to imprisonment  
19 may not be removed “until the alien is released from imprisonment,” *id.*  
20 § 1231(a)(4), in which case the mandatory 90-day removal period begins on “the date  
21 the alien is released from detention or confinement,” *id.* § 1231(a)(1)(B).

22 The connection between immigration law and criminal law is also reflected in  
23 the fact that the INA contains a number of criminal provisions related to  
24 immigration. For example, the statute imposes criminal penalties on an alien for  
25 failing to register with federal authorities and for failing to notify federal authorities  
26 of a change of address. *Id.* § 1306(a), (b). More seriously, the INA imposes criminal  
27 penalties on any person who conceals, harbors, or shields an alien from detention “in  
28 any place, including any building or any means of transportation,” “knowing or in

1 reckless disregard of the fact that an alien has come to, entered, or remains in the  
2 United States in violation of law.” *Id.* § 1324(a)(1)(A)(iii).

3       The INA repeatedly contemplates coordination between federal officials and  
4 state and local officials on immigration enforcement. For example, state and local  
5 officers are authorized to make arrests for violation of the INA’s prohibitions against  
6 smuggling, transporting, or harboring aliens, *id.* § 1324(c), and to arrest certain  
7 felons who have unlawfully returned to the United States, *id.* § 1252c; *see id.*  
8 § 1357(g)(1) (authorizing formal cooperative agreements under which trained and  
9 qualified state and local officers may perform specified “[f]unction[s] of a federal  
10 immigration officer in relation to the investigation, apprehension, or detention of  
11 aliens”); *id.* § 1357(g)(10) (authorizing cooperation in “identification, apprehension,  
12 detention, or removal of aliens not lawfully present in the United States” even in  
13 absence of formal agreement). Consistent with this coordination and with the  
14 importance of state and local criminal proceedings under the INA, certain provisions  
15 of federal immigration law protect the transfer of information regarding aliens  
16 between and among federal officials and state and local government entities. Section  
17 1373 of Title 8 provides that “a Federal, State, or local government entity or official  
18 may not prohibit, or in any way restrict, any government entity or official from  
19 sending to, or receiving from [federal immigration authorities] information regarding  
20 the citizenship or immigration status, lawful or unlawful, of any individual.” Section  
21 1644 of Title 8 contains substantially the same proscription. Section 1373 also states  
22 that no person or agency may prohibit or restrict a federal, state, or local government  
23 entity from “[m]aintaining such information” or from “[e]xchanging such informa-  
24 tion with any other Federal, State, or local government entity.” By the same token,  
25 the INA requires federal immigration authorities to “cooperate with the States” to  
26 ensure that state and local officials have information to assist them in making arrests  
27 under the INA. *Id.* § 1252c(b).



## II. Gang Suppression Planning Grants Program

In the Fiscal Year 2018 appropriation for the Department of Justice, Congress included funds for certain purposes that were not previously included in any Department program. Specifically, the appropriation included the following:

For grants, contracts, cooperative agreements, and other assistance authorized by the Juvenile Justice and Delinquency Prevention Act of 1974 (“the 1974 Act”) . . . \$282,500,000, to remain available until expended as follows . . .

(3) \$27,500,000 for delinquency prevention, as authorized by section 505 of the 1974 Act, of which, pursuant to sections 261 and 262 thereof . . .

(B) *\$4,000,000 shall be for gang and youth violence education, prevention and intervention, and related activities . . . .*

(E) *\$8,000,000 shall be for community-based violence prevention initiatives, including for public health approaches to reducing shootings and violence . . . .*

Pub. L. No. 115-141, 132 Stat. 348, 420, 422-23 (2018) (emphasis added).

To carry out the italicized language, OJP created two new programs within OJP’s Office of Juvenile Justice and Delinquency Prevention, one of which, the FY 2018 Gang Suppression Planning Grants Program, is involved here.<sup>3</sup> In contrast to the Byrne JAG Program previously considered by this Court, this is a competitive, discretionary grant program rather than a formula grant program, meaning that only certain of the applicants will receive an award. *See* Declaration of Caren Harp ¶ 2 (Attachment 1 hereto); *see also* *Champaign Cty., Ill. v. U.S. Law Enf’t Assistance Admin.*, 611 F.2d 1200, 1203 (7th Cir. 1979). Other than the subject matter, the statutory authorization does not set out the details of the program; every facet of the program is left to agency discretion, as is common with appropriations acts. The solicitation for the Gang Suppression program sought proposals from jurisdictions with “high levels of youth-perpetrated gun crime and gang violence” to undertake “strategic planning and capacity-building work through multidisciplinary and

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<sup>3</sup> Plaintiff calls this the “Juvenile Gang Prevention Grant,” but that term does not appear in the appropriation or the solicitation.



community partnerships.” Admin. Record at AR01482 (2018 Solicitation at 7).<sup>4</sup>

The Gang Suppression grant includes a particular focus on transnational gangs: “[OJP] will give priority consideration to applicants that demonstrate and articulate their knowledge of its local gang issues, particularly those that are impacted by transnational gangs such as MS-13 or M-18. *Id.* at AR01485 (MS-13 and M-18 are two transnational gangs with a significant presence in North and Central America.) Consistent with this focus, the solicitation notified applicants that a feature of the new program would be modest cooperation between federal law enforcement and local law enforcement with respect to criminal aliens in local law enforcement’s criminal custody. *Id.* at AR01514-15 (2018 Solicitation at 39-40). In order to assess the accuracy of each recipient’s certification that it could fulfill these requirements, the solicitation stated that each applicant would be required to identify any governing “laws, policies, or practices related to whether, when, or how [the applicant’s] employees may communicate” with federal immigration authorities. *Id.* at AR01505 (2018 Solicitation at 30). OJP has received eighteen applications for the FY 2018 Gang Suppression program, and the Office has not yet determined which applicants will receive an award. *See* Harp Decl. ¶¶ 3-4.

Once issued, awards under this program will include the following requirements:

- Consistent with the objectives of federal law enforcement statutes – including 8 U.S.C. § 1324(a), the smuggling/harboring statute referred to above, and 18 U.S.C. § 1071 – not to publicly disclose any sensitive federal law enforcement information in an attempt to harbor or shield an alien or fugitive from detection, regardless of whether the disclosure would violate 8 U.S.C. § 1324(a) (“public-disclosure requirement”), Admin. Record at AR01748 (Marion, Ohio, Byrne JAG Award ¶ 44); *see* Harp Decl. ¶ 4;

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<sup>4</sup> The Administrative Record in this action was filed with a Notice of Filing of Administrative Record on November 13, 2018. Dkt. No. 47.

- 1 • Consistent with federal law enforcement statutes and regulations – including 8  
2 U.S.C. § 1357(a)(1), the INA interrogation statute referred to above, and 8  
3 C.F.R. § 287.5(a)(1) – not to interfere with the exercise of that authority by  
4 impeding the access of immigration officials to any correctional facility to  
5 meet with an alien for such an interrogation (the “interview requirement”),  
6 Admin. Record at AR01749 (¶ 45); *see* Harp Decl. ¶ 4;
- 7 • Consistent with federal law enforcement statutes – including 8 U.S.C.  
8 §§ 1231(a) and 1226(c)(1), the statutes requiring federal immigration officials  
9 to take custody of a criminal alien “when the alien is released” from state or  
10 local custody – not to interfere with the removal process by failing to notify  
11 immigration officials “as early as practicable” regarding the scheduled release  
12 date and time of an alien in the grantee’s custody when requested by  
13 immigration officials (the “custody requirement”), Admin. Record at  
14 AR01750 (¶ 46); *see* Harp Decl. ¶ 4; and
- 15 • To comply with 8 U.S.C. §§ 1373 and 1644, and not to obligate or draw  
16 down grant funds if the recipient is subject to any prohibition or restriction  
17 against providing information regarding immigration status to federal  
18 authorities (the “information requirement”), Admin. Record at AR01745-47  
19 (¶¶ 41, 42, 43); *see* Harp Decl. ¶ 4.<sup>5</sup>

20 The Gang Suppression awards will include “Rules of Construction” making  
21 clear that nothing in the custody requirement will require an award recipient to  
22 detain “any individual in custody beyond the date and time the individual otherwise  
23 would have been released.” Admin. Record at AR01750 (¶ 46). The award  
24 documents will also make clear that this requirement imposes no obligations in

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25  
26 <sup>5</sup> Plaintiff’s characterization of these requirements is based primarily on the  
27 FY 2018 *solicitations* rather than the actual award documents. The First Amended  
28 Complaint calls the above-listed requirements the “harboring condition,” the  
“access condition,” the “notice condition,” and the “1373 and 1644 condition,”  
respectively.

1 relation to any requests from federal immigration authorities to detain non-citizens,  
 2 and that it requires “only as much advance notice as practicable” before the release  
 3 of an alien. *Id.* Further, the awards will define “impeding” access to a correctional  
 4 facility, for purposes of the interview requirement, as taking any action or following  
 5 any law or policy that “is designed to prevent or to significantly delay or compli-  
 6 cate” such access or that “has the effect of preventing or of significantly delaying or  
 7 complicating” such access. Admin. Record at AR01749 (¶ 45); *see* Harp Decl. ¶ 4.

### 8 **III. Edward Byrne Memorial Justice Assistance Grant Program**

9 As described in prior filings before this Court, the Assistant Attorney General  
 10 (“AAG”) for OJP possesses “[s]pecific, general and delegated powers,” including the  
 11 power to “maintain liaison with . . . State governments in matters relating to criminal  
 12 justice.” 34 U.S.C. § 10102(a)(2). The statute also authorizes the AAG to “exercise  
 13 such other powers and functions as may be vested in [him] pursuant to this chapter or  
 14 by delegation of the Attorney General, including placing special conditions on all  
 15 grants, and determining priority purposes for formula grants.” *Id.* § 10102(a)(6).

16 The predecessor to the Byrne JAG Program was created in the same statute  
 17 that created OJP. Under this program, OJP is authorized to “make grants to States  
 18 and units of local government . . . to provide additional personnel, equipment . . .  
 19 and information systems for criminal justice, including for any one or more of  
 20 [certain enumerated] programs.” *Id.* § 10152(a)(1). In the same chapter, “criminal  
 21 justice” is defined broadly to include various activities of the police, the courts, and  
 22 “related agencies.” *Id.* § 10251(a)(1).

23 The Byrne JAG Program provides “formula grants” – that is, grants that, when  
 24 awarded, must follow a statutory formula based on population, the rate of violent  
 25 crime, and other factors. *Id.* § 10156. By statute, in order to request a Byrne JAG  
 26 grant, the chief executive officer of a State or unit of local government must submit  
 27 an application “in such form as the Attorney General may require,” *id.* § 10153(a),  
 28 and the application must include, among other things, “[a] certification, made in a

1 form acceptable to the Attorney General . . . that . . . the applicant will comply with  
2 . . . all . . . applicable Federal laws,” *id.* § 10153(a)(5)(D).

3 OJP has historically included a variety of conditions in Byrne JAG awards.  
4 For example, the Office has imposed, without objection, conditions related to  
5 information sharing and privacy protection, *see* Defs’ Request for Judicial Notice  
6 (“RJN”) (Attachment 2 hereto), Ex. A ¶ 27 (Los Angeles 2016 award), research  
7 using human subjects, *see id.*, Ex. A ¶ 26, and training, *see id.*, Ex. A ¶¶ 29-30.  
8 Other historical conditions imposed by the AAG have been inspired by Executive  
9 Branch prerogatives, and in some instances resulted in *subsequent* congressional  
10 codification. One such condition, which prohibits use of Byrne JAG funds to  
11 purchase military style equipment, relates in part to an Executive Order issued by  
12 President Obama. *See id.*, Ex. A ¶ 43; Exec. Order No. 13,688, 80 Fed. Reg. 3451  
13 (Jan. 16, 2015), *rescinded* by Exec. Order No. 13,809, 82 Fed. Reg. 41,499 (Aug.  
14 28, 2017). Since 2012, other conditions have required that recipients (a) comply  
15 with specific national standards when purchasing body armor and (b) institute a  
16 “mandatory wear” policy for any purchased armor. RJN, Ex. A ¶¶ 36-37. While  
17 those conditions have now been codified, *see* 34 U.S.C. § 10202(c)(1)(B), (C), they  
18 originated as exercises of the Department’s authority to impose special conditions.  
19 And the AAG has imposed an “American-made” requirement for body armor  
20 purchases, something Congress did not choose to codify last year. RJN, Ex. A ¶ 36.  
21 The conditions attached to Byrne JAG grants have varied over time, depending on  
22 national law enforcement necessities and Department priorities.

23 Fiscal Year 2018 Byrne JAG grants contain the same immigration-related  
24 requirements described above in relation to the Gang Suppression program.  
25 Admin. Record at AR01690-777. Plaintiff received its FY 2018 award on November  
26 13, 2018. RJN, Ex. C.

## ARGUMENT

Defendants move for dismissal of this action under Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure or for summary judgment under Rule 56. A motion under Rule 12(b)(1) challenges the subject matter jurisdiction of the court to reach a claim, and a motion under Rule 12(b)(6) “tests the legal sufficiency of a claim.” *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). A court must grant summary judgment “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).

With respect to certain FY 2018 Byrne JAG conditions, defendants recognize that this Court has ruled against conditions used in the FY 2017 Byrne JAG Program that were similar to the FY 2018 interview, custody, and information conditions. Defendants also recognize that the injunction in *California v. Whitaker*, No. 3:17-cv-04701-WHO (N.D. Cal.), benefits the plaintiff and applies to future grant years.<sup>6</sup> Defendants respectfully disagree with those rulings, but do not now repeat in full their arguments in defense of the interview, custody, and information conditions in the FY 2018 Byrne JAG Program, other than to incorporate herein their arguments made previously and to preserve them for further review. *See Los Angeles v. Whitaker*, No. 2:17-cv-07215-R-JC (C.D. Cal.), Dkt. Nos. 86, 89. Defendants retain their right to elaborate upon those arguments based on the outcome of *Los Angeles v. Whitaker*, No. 18-56292 (9th Cir.), and other cases.

### **I. Plaintiff Lacks Standing to Challenge the Requirements in the FY 2018 Gang Suppression Planning Grants Program**

Article III of the Constitution limits federal court jurisdiction to live “Cases” and “Controversies.” To satisfy the “irreducible constitutional minimum” of standing, a plaintiff must demonstrate an “injury in fact,” a “fairly traceable” causal

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<sup>6</sup> In light of this injunction and the pendency of defendants’ appeal in that case, this Court should stay plaintiff’s current claims regarding the FY 2018 interview, custody, and information conditions.

1 connection between the injury and defendant's conduct, and redressability. *Steel*  
2 *Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-03 (1998). The injury needed  
3 for standing must be "concrete," "objective," and "palpable," not merely "abstract"  
4 or "subjective." See *Whitmore v. Arkansas*, 495 U.S. 149, 155, 178 (1990); *Bigelow*  
5 *v. Virginia*, 421 U.S. 809, 816-17, 830 (1975). Additionally, the injury must be  
6 "certainly impending" rather than "speculative." *Whitmore*, 495 U.S. at 157, 158.

7 Under these principles, Los Angeles lacks standing to challenge the FY 2018  
8 Gang Suppression requirements because it is unknown whether the City will be  
9 chosen to receive an award, without regard to the requirements challenged here. As  
10 noted earlier, this is a discretionary, competitive grant program, such that OJP will  
11 need to choose recipients from among the various applicants. See Harp Decl. ¶ 2.  
12 The grant requirements will have no effect on the plaintiff if it is not chosen to  
13 receive a Gang Suppression grant. Therefore, it is "speculative" whether Los  
14 Angeles will suffer any "concrete" injury from the requirements, such that the City  
15 lacks standing to challenge them. See *Whitmore*, 495 U.S. at 155, 156.

16 The situation here – and the reasons for plaintiff's lack of standing in relation  
17 to the Gang Suppression program – are very different from the situation regarding  
18 the COPS Hiring Program ("CHP") that this Court considered in *Los Angeles v.*  
19 *Whitaker*, No. 2:17-cv-07215-R-JC (C.D. Cal.), Dkt. No. 75. In that case, the City  
20 challenged certain immigration-related scoring factors under CHP, and the Court  
21 held that plaintiff had standing because application of the resulting bonus points  
22 would put the City at a "competitive disadvantage" compared to applicants that could  
23 secure those bonus points. *Id.* at 3, 11. Here, in contrast, Los Angeles challenges  
24 award requirements that are not imposed until *after* the selection of recipients, such  
25 that the challenged requirements may never affect the City at all. Additionally,  
26 whereas Los Angeles had received a CHP grant in prior years, here there is no such  
27 history in relation to the Gang Suppression program.



**II. The Challenged Requirements in the FY 2018 Gang Suppression Program Are Permissible**

On the merits, plaintiff alleges that the above-described features and requirements of the FY 2018 Gang Suppression grant program, and only those requirements, violate the Separation of Powers, the Spending Clause, and the Tenth Amendment. Even if plaintiff had standing to challenge those requirements, its claims would be without merit.<sup>7</sup>

**A. The Gang Suppression Requirements Are Authorized by Statute and Do Not Violate the Separation of Powers**

In Count Five of its First Amended Complaint, plaintiff alleges that the Gang Suppression requirements exceed the Department's statutory authority and intrude upon the powers of Congress. First Am. Compl. ¶¶ 132-146. The nature of the congressional authorization for this program, however, gives the Department significant discretion in developing the program, including the discretion to adopt the challenged requirements.

As a preliminary matter, it is well-established that Congress may, consistent with the separation of powers, properly delegate to the Executive Branch the authority to impose requirements on recipients of agency spending. *See, e.g., Clinton v. City of N.Y.*, 524 U.S. 417, 488 (1998) (“Congress has frequently delegated the President the authority to spend, or not to spend, particular sums of money.”) (Breyer, J. dissenting); *DKT Mem'l Fund Ltd.*, 887 F.2d 275 at 280-81 (upholding conditions on spending where statute authorized President to set certain “terms and conditions as he may determine”). Accordingly, plaintiff's assertion

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<sup>7</sup> The requirement to provide information about the applicant's laws and policies is not a program requirement in the same sense as the public-disclosure, interview, custody, and information requirements, even though this brief will sometimes include it under the rubric “requirement” for the sake of brevity. OJP requires the provision of that information as part of the application, but the requirement does not relate to a recipient's conduct during the course of the grant as do the four other requirements.

1 that Congress itself does not currently impose immigration-related requirements on  
2 the receipt of grant funds, First Am. Compl. ¶ 105, is wholly beside the point.  
3 Rather, the sole relevant question here is whether Congress has *delegated* sufficient  
4 authority to the Department to impose these requirements.

5 Based on the nature of the legislation that prompted the Gang Suppression  
6 program, the existence of such delegation here is inescapable. Besides appropriat-  
7 ing funds specifically for an established program – as with annual appropriations  
8 for the Byrne JAG Program – Congress may appropriate funds without tying them  
9 to a specific program. These take the form of either a “lump-sum” appropriation  
10 for the agency generally or a “one-line” appropriation for a stated purpose within  
11 the agency’s responsibilities. *See* GAO, Principles of Federal Appropriations Law,  
12 3d ed., ch. 6, § C.1, GAO-06-382SP, *available at* [https://www.gao.gov/legal/](https://www.gao.gov/legal/appropriations-law-decisions/red-book)  
13 [appropriations-law-decisions/ red-book](https://www.gao.gov/legal/appropriations-law-decisions/red-book) (last visited Nov. 13, 2018). The  
14 appropriations that became the FY 2018 Gang Suppression program are of the final  
15 type – one-line appropriations not tied to an established program. Congress  
16 appropriated \$4 million for the Department to use “for gang and youth violence  
17 education, prevention and intervention, and related activities” and \$8 million “for  
18 community-based violence prevention initiatives, including for public health  
19 approaches to reducing shootings and violence.” Pub. L. No. 115-141, 132 Stat. at  
20 423.<sup>8</sup> Where Congress appropriates funds for a stated purpose not within an estab-

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21  
22 <sup>8</sup> Although Congress stated that the funds were appropriated “pursuant to  
23 sections 261 and 262” of the Juvenile Justice and Delinquency Prevention Act of  
24 1974 (“1974 Act”), 132 Stat. at 422-23, the appropriation was related to those  
25 provisions only in a general sense. Section 261, now codified at 34 U.S.C. §  
26 11171, authorizes OJJPD to “carry out projects for the development, testing, and  
27 demonstration of promising initiatives and programs for the prevention, control, or  
28 reduction of juvenile delinquency.” Section 262, codified at 34 U.S.C. § 11172,  
authorized grants for “technical assistance” to carry out projects under Section 261.  
Section 505 of the 1974 Act, also referred to in the appropriation, was simply an  
“authorization of appropriations” for Fiscal Years 2004 through 2008. Pub. L. No.  
107-273, 116 Stat. 1758 (2002).



1 lished program, the agency must either incorporate the funds into an established  
2 program or create a program to carry out the stated purpose using those funds.

3 In the case of either a lump-sum appropriation for an agency's purposes  
4 generally or a one-line appropriation not tied to a particular program, the agency's  
5 discretion in determining how to spend the appropriated funds is at its zenith. In  
6 *Lincoln v. Vigil*, 508 U.S. 182 (1993), plaintiffs challenged the termination of a  
7 program that the Indian Health Service of the Department of Health and Human  
8 Services had carried out for several years based on Congress' annual appropriations  
9 for the agency's overall expenses and its general authority to provide health care for  
10 Native Americans. *Id.* at 185-88. The Supreme Court held that the program's  
11 termination was unreviewable under the APA. The Court noted:

12 The allocation of funds from a lump-sum appropriation is another  
13 administrative decision traditionally regarded as committed to agency  
14 discretion. After all, the very point of a lump-sum appropriation is to  
15 give an agency the capacity to adapt to changing circumstances and  
16 meet its statutory responsibilities in what it sees as the most effective  
17 or desirable way.

18 *Id.* at 192.

19 Also reflecting these principles is *International Union v. Donovan*, 746 F.2d  
20 855 (D.C. Cir. 1984) (opinion by Scalia, C.J.). There, the Department of Labor had  
21 created a program pursuant to specific statutory authorization, but decided not to  
22 allocate any funding to the program out of a later lump-sum appropriation that did  
23 not mention the program. *Id.* at 857-58. The court held that the decision not to  
24 fund the program was unreviewable, stating that "[a] lump-sum appropriation  
25 leaves it to the recipient agency . . . to distribute the funds among some or all of the  
26 permissible objects as it sees fit." *Id.* at 861. Thus, the court said, "[t]he issue here  
27 is not how Congress expected or intended the Secretary to behave, but how it  
28 required him to behave, through the only means by which it can (as far as the courts  
are concerned, at least) require anything – the enactment of legislation. Our focus,  
in other words, must be upon the text of the appropriation." *Id.* at 860-61.

1 Here, Congress appropriated funding for OJP, through its Office of Juvenile  
2 Justice and Delinquency Prevention, to provide for “gang and youth violence  
3 education, prevention and intervention, and related activities” and “community-  
4 based violence prevention,” and the agency created the FY 2018 Gang Suppression  
5 program to carry out that directive. Under *Lincoln* and *International Union*, an  
6 agency is authorized to carry out such an appropriation as it “sees fit,” subject to the  
7 language of the appropriation and the nature of agency’s responsibilities. In the  
8 face of such an appropriation, the agency has authority to “meet its statutory  
9 responsibilities in what it sees as the most effective or desirable way.” *Lincoln*, 508  
10 U.S. at 192. The focus is on “the text of the appropriation.” *International Union*,  
11 746 F.2d at 861. This is especially true in relation to discretionary, competitive  
12 grants such as the Gang Suppression grant. OJP implemented the language of  
13 Congress’s recent appropriation by creating, as Congress directed, a program for  
14 “community-based violence prevention” and “gang and youth violence education,  
15 prevention and intervention, and related activities.”

16 The Department’s substantial discretion to craft a competitive program based  
17 on this appropriations language includes the authority to advance particular law  
18 enforcement strategies to address gang violence. Consistent with this principle,  
19 OJP gives “priority consideration” to applicants that demonstrate knowledge of and  
20 are impacted by “transnational gangs such as MS-13 or M-18.” Admin. Record at  
21 AR01485. Plaintiff does not challenge this feature of the program. And, OJP is  
22 requiring participants to employ strategies that ensure criminal aliens in their  
23 custody are turned over to DHS rather than released back into the community – a  
24 strategy that reflects the *transnational* nature of transnational gangs.

25 OJP’s established statutory authority further supports the Office’s authority  
26 to craft the Gang Suppression grant program as it has. The public-disclosure  
27 requirement and the requirement regarding the applicant’s laws and policies are  
28 closely related to OJP’s statutory responsibility to “maintain liaison” among federal,

1 state, and local authorities. 34 U.S.C. § 10102(a)(2). Federal, state, and local law  
2 enforcement priorities may differ, and federal authorities are entitled to know when  
3 state and local laws or policies may conflict with federal priorities. An agency  
4 statutorily charged with maintaining that “liaison” is naturally empowered to secure  
5 information regarding state and local laws and policies. And where federal law  
6 enforcement officials do work with state and local officials, federal officials are  
7 naturally entitled to insist on the protection of sensitive federal law enforcement  
8 information. Coordination among federal, state, and local law enforcement officials  
9 necessarily requires maintaining the confidentiality of shared information.  
10 Additionally, the requirement to provide information about the applicant’s laws and  
11 policies is an exercise of OJP’s express authority to dictate the form of an  
12 application under the Byrne JAG Program. *Id.* § 10153(a).

13 Finally, plaintiff argues that the challenged requirements violate 34 U.S.C.  
14 § 10228(a), which provides that nothing in the federal statutes “shall be construed  
15 to authorize any department, agency, officer, or employee of the United States to  
16 exercise any direction, supervision, or control over any police force or any other  
17 criminal justice agency of any State or any political subdivision thereof.” First Am.  
18 Compl. ¶ 108. But nothing in the challenged requirements has that effect. To begin  
19 with, Gang Suppression grantees voluntarily consent to award requirements in  
20 return for receiving federal funds. This is a *voluntary* program. If grantees are  
21 unhappy with its features, they are free to decline the award and thus avoid any  
22 obligation to comply with its requirements. Additionally, requiring modest  
23 cooperation with federal law enforcement in exchange for federal law enforcement  
24 funds does not constitute exercising “direction, supervision, or control.” Rather,  
25 the program features challenged here only enhance coordination among federal,  
26 state, and local law enforcement officers, which Congress expressly encourages.  
27 For example, concurrent with the enactment of 34 U.S.C. § 10228, Congress  
28 created the National Institute of Justice (a component of OJP), *see* An Act to

1 Restructure the Federal Law Enforcement Assistance Administration, Pub. L. No.  
 2 96-157, §§ 202, 815, 93 Stat. 1167, 1172, 1206 (1979), which has as one of its  
 3 express statutory purposes “to develop programs and projects . . . to improve and  
 4 expand cooperation among the Federal Government, States, and units of local  
 5 government . . . .” 34 U.S.C. § 10122(c)(2)(F).

6 **B. The Gang Suppression Requirements Are Consistent with**  
 7 **the Spending Clause**

8 Count Six of plaintiff’s First Amended Complaint alleges that the Gang  
 9 Suppression program requirements violate the Spending Clause. First Am. Compl.  
 10 ¶¶ 147-150. Under its spending authority, Congress “may offer funds to the States,  
 11 and may condition those offers on compliance with specified conditions.” *Nat’l*  
 12 *Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 537 (2012) (“*NFIB*”). It is well-  
 13 established that the Spending Clause confers broad authority, such that conditions  
 14 imposed pursuant to this authority may permissibly require States to “tak[e] certain  
 15 actions that Congress could not [otherwise] require them to take.” *Coll. Sav. Bank*  
 16 *v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999).  
 17 Nevertheless, the spending authority is subject to certain discrete limitations, two of  
 18 which are purportedly at issue here: (1) “conditions on federal grants may be  
 19 illegitimate if they are unrelated to the federal interest in particular national projects  
 20 or programs”; and (2) conditions must be “unambiguous[.]” *South Dakota v. Dole*,  
 21 483 U.S. 203, 207 (1987). The Gang Suppression requirements easily satisfy both  
 22 of these aspects of *Dole*.

23 **1. The Requirements Are Related to the Purposes of**  
 24 **the Gang Suppression Program**

25 Initially, it is well-established that the “relatedness” aspect of *Dole* does not  
 26 pose a difficult hurdle; to the contrary, the Ninth Circuit has emphasized that this is  
 27 a “low-threshold” inquiry that “is a far cry from . . . an exacting standard for  
 28 relatedness.” *Mayweathers v. Newland*, 314 F.3d 1062, 1067 (9th Cir. 2002); *see*  
*New York v. United States*, 505 U.S. 144, 167 (1992) (stating that only “some rela-

1 tionship” is necessary between spending conditions and “the purpose of the federal  
 2 spending.”). As the D.C. Circuit has observed, the Supreme Court has never  
 3 “overturned Spending Clause legislation on relatedness grounds.” *Barbour v. Wash.*  
 4 *Metro. Area Transit Auth.*, 374 F.3d 1161, 1168 (D.C. Cir. 2004).

5 As noted earlier, “criminal aliens” are a core concern of the INA. 34 U.S.C.  
 6 § 10152(a)(1); 8 U.S.C. §§ 1226(c), 1228(a), 1231(a)(6), 1378. Furthermore, gang  
 7 activity is a significant concern in the enforcement of both immigration law and  
 8 criminal law. *Compare, e.g., Calmo v. Sessions*, No. C 17-07124 WHA, 2018 WL  
 9 2938628, at \*1 (N.D. Cal. June 12, 2018) (noting that immigration judge had  
 10 considered gang membership, among other things, in determining whether alien  
 11 posed danger to community), and *Bravo v. Green*, No. CV 16-4937 (JLL), 2017  
 12 WL 2268315, at \*1 (D.N.J. May 24, 2017) (same), *with, e.g.,* 18 U.S.C. § 521  
 13 (providing that sentence for certain federal criminal offenses shall be increased by  
 14 up to 10 years if defendant participated in violent criminal gang).

15 Further, a focus of this particular grant program is transnational gangs,  
 16 Admin. Record at AR01485, and the challenged requirements reflect the importance  
 17 of cooperation at all levels of law enforcement to address transnational gang  
 18 violence. *See, e.g.,* [https://www.justice.gov/opa/pr/22-ms-13-members-and-](https://www.justice.gov/opa/pr/22-ms-13-members-and-associates-charged-federally-ice-s-ms-13-targeted-operation-raging-bull)  
 19 [associates-charged-federally-ice-s-ms-13-targeted-operation-raging-bull](https://www.justice.gov/opa/pr/22-ms-13-members-and-associates-charged-federally-ice-s-ms-13-targeted-operation-raging-bull) (noting a  
 20 significant operation against MS-13 resulting in 267 arrests, which included coopera-  
 21 tion between the Department, DHS, and local law enforcement). Ensuring that DHS  
 22 can take custody of criminal aliens – particular those who may be gang members – in  
 23 the custody of local law enforcement partners is an essential component of the strate-  
 24 gies the Department is seeking to promote through this highly discretionary program.

25 The need for one of the program features – the public-disclosure requirement  
 26 – and its relationship to the purposes of the Gang Suppression program (and the  
 27 Byrne JAG Program) is even clearer in light of recent events. Included in the  
 28 Administrative Record in this action are public Twitter and Facebook posts by the

1 mayor of a U.S. city informing residents of an impending operation by federal  
 2 immigration authorities. Admin. Record at AR01038-39. In those  
 3 communications, the executive of a U.S. jurisdiction specifically made a “public  
 4 disclosure [of] federal law enforcement information in a direct or indirect attempt to  
 5 conceal, harbor, or shield from detection . . . any alien who [had] come to, entered,  
 6 or remain[ed] in the United States” in violation of law. Federal law enforcement  
 7 officials must be able to inform state and local officials of impending operations  
 8 without fear of compromising those operations. Such basic coordination is  
 9 essential not only for the success of operations but also for the safety of law  
 10 enforcement personnel and the public.

11 In sum, ensuring that jurisdictions receiving federal funds to fight gang  
 12 activity do not hinder the enforcement of immigration law supports the purposes the  
 13 Gang Suppression program.

## 14 **2. The Gang Suppression Requirements Are Unambiguous**

15 Another limitation on the spending power is that when the Federal  
 16 Government “desires to condition the States’ receipt of federal funds, it must do so  
 17 unambiguously, enabling the States to exercise their choice knowingly, cognizant  
 18 of the consequences of their participation.” *Dole*, 483 U.S. at 207 (citation  
 19 omitted). The Gang Suppression award requirements easily satisfy this aspect of  
 20 *Dole*, especially in light of the accompanying “Rules of Construction.”

21 The public-disclosure requirement states very clearly that it prohibits the  
 22 “public disclosure [of] federal law enforcement information in a direct or indirect  
 23 attempt to conceal, harbor, or shield from detection any fugitive from justice under  
 24 18 U.S.C. ch. 49, or any alien who has come to, entered, or remains in the United  
 25 States in violation of 8 U.S.C. ch. 12 – without regard to whether such disclosure  
 26 would constitute (or could form a predicate for) a violation of 18 U.S.C. [§§] 1071  
 27 or 1072 or of 8 U.S.C. [§] 1324(a). The Rules of Construction, moreover, define  
 28 “alien,” “federal law enforcement information,” and “public disclosure” in detail.



1 Similarly, in the solicitation, the requirement to provide information regarding the  
 2 applicant's laws or policies asks very clearly whether the recipient has "any laws,  
 3 policies, or practices related to whether, when, or how employees may communi-  
 4 cate with DHS or ICE" or is "subject to any [such] laws from a superior political  
 5 entity (e.g., a state law that binds a city)." Admin. Record at AR01505.

6 Further, the information requirement expressly defines a disqualifying  
 7 "information-communication restriction," for purposes of that condition, as any  
 8 policy or practice that would –

9 prohibit or in any way restrict (1) any government entity or official  
 10 from sending or receiving information regarding citizenship or  
 11 immigration status as defined in 8 U.S.C. § 1373(a); or (2) a govern-  
 12 ment entity or -agency from sending, receiving, maintaining, or  
 exchanging information regarding immigration status as described in  
 either 8 U.S.C. § 1373(b) or 1644.

13 Admin. Record at AR01746; *see* Harp Decl. ¶ 4. The "Rules of Construction"  
 14 define "immigration status" and other terms, and specify that "[n]othing in this  
 15 condition shall be understood to authorize or require any recipient . . . to violate any  
 16 federal law, including any applicable civil rights or nondiscrimination law."

17 Admin. Record at AR01746. Similarly, the interview requirement incorporates the  
 18 same Rules of Construction, and specifies that the term "impede," in relation to  
 19 "impeding access" to a correctional facility, "includes taking or continuing any  
 20 action, or implementing or maintaining any law, policy, rule, or practice that . . . is  
 21 designed to prevent or significantly delay complicate, or . . . has the effect of  
 22 preventing or of significantly complicating." *Id.* at AR01749. The custody  
 23 requirement specifies that "[n]othing in this condition shall be understood to  
 24 authorize or require any recipient . . . to maintain (or detain) any individual in  
 25 custody beyond the date and time the individual otherwise would have been  
 26 released." *Id.* at AR017450. To the extent any uncertainty might possibly remain,  
 27 the grant award documents specifically direct that "[a]ny questions about the  
 28 meaning or scope" of the conditions "should be directed to OJP." *Id.* at AR01746.

1 Finally, any arguable marginal uncertainty regarding the outer boundaries of  
 2 these conditions would not render them unconstitutionally ambiguous. Indeed, “the  
 3 exact nature of [grant] conditions may be largely indeterminate, provided that the  
 4 existence of the conditions is clear, such that States have notice that compliance  
 5 with the conditions is required.” *Charles v. Verhagen*, 348 F.3d 601, 607 (7th Cir.  
 6 2003) (citation omitted); *see Benning v. Georgia*, 391 F.3d 1299, 1306 (11th Cir.  
 7 2004) (“Once Congress clearly signals its intent to attach . . . conditions . . . it need  
 8 not specifically identify and proscribe in advance every conceivable state action  
 9 that would be improper.” (citation omitted)); *see also Van Wyhe v. Reisch*, 581 F.3d  
 10 639, 650 (8th Cir. 2009) (finding notice requirement satisfied even where condition  
 11 “provides a pliable standard”); *Mayweathers*, 314 F.3d at 1067 (finding notice  
 12 requirement satisfied even with a “standard [that] is perhaps unpredictable because  
 13 it has resulted in different determinations in different courts”).

14 **C. The Gang Suppression Requirements Are Consistent**  
 15 **with the Tenth Amendment**

16 In Count Seven, plaintiff alleges that the Gang Suppression program  
 17 requirements would violate the Tenth Amendment if the federal statutes cited were  
 18 construed as supporting the requirements. First Am. Compl. ¶¶ 151-158. None of  
 19 the challenged requirements, however, compels the plaintiff to “enact or administer  
 20 a federal regulatory program” or to “act on the Federal Government’s behalf.” *New*  
 21 *York v. United States*, 505 U.S. 144, 188 (1992); *see NFIB*, 567 U.S. at 620. To  
 22 begin with, the requirements do not “compel” the plaintiff to do anything. Rather,  
 23 they are tied to the receipt of federal funds, and Los Angeles is free to accept or reject  
 24 them. As the Supreme Court has held, the Federal Government “may offer funds to  
 25 [state and local jurisdictions], and may condition those offers on compliance with  
 26 specified conditions.” *Id.* at 537; *cf. Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 847  
 27 (9th Cir. 2003) (“[A]s long as the alternative to implementing a federal regulatory  
 28 program does not offend the Constitution’s guarantees of federalism, the fact that the



1 alternative is difficult, expensive or otherwise unappealing is insufficient to establish  
2 a Tenth Amendment violation.”) (citation omitted).

3 Further, the requirements relate only to whether recipients of federal law  
4 enforcement funds may *frustrate* federal law enforcement. The requirements do not  
5 compel recipients to administer a federal program or to act on the Federal Govern-  
6 ment’s behalf, but only to refrain from “impeding access” to correctional facilities  
7 to meet with aliens, to refrain from interfering with the removal of criminal aliens  
8 by providing information about the impending release of aliens, and to refrain from  
9 prohibiting or restricting the provision of information by employees. The require-  
10 ment regarding the applicant’s laws and policies only seeks information on any  
11 laws or policies that would *impede* the enforcement of federal immigration law, and  
12 the public-disclosure requirement only requires refraining from public disclosure of  
13 law enforcement information received from *federal* agencies.

14 Finally, in relation to the public-disclosure requirement, plaintiff alleges that  
15 the federal smuggling statute, 8 U.S.C. § 1324, would violate the Tenth Amendment  
16 if defendants were “permitted to interpret [it] to apply to State and local officials.”  
17 First Am. Compl. ¶ 156. But this requirement does not seek to “apply” the federal  
18 smuggling statute to the plaintiff in the sense of prosecuting the City thereunder.  
19 Even if Los Angeles cannot be prosecuted for violating a particular federal criminal  
20 law, the Department can legitimately expect the City – as a condition of receiving  
21 federal law enforcement funds – to refrain from disclosing sensitive federal law  
22 enforcement information in an effort to defeat the law’s enforcement. In sum, this  
23 case is not about compelling state or local governments to perform federal  
24 functions, but about preventing interference with *the Federal Government’s*  
25 *performance* of its own functions.

26  
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28

**III. The Public-Disclosure Condition and the Requirement to Provide Information about Laws and Policies in the FY 2018 Byrne JAG Program Are Permissible**

**A. The Public-Disclosure Condition and the Requirement to Provide Information about Laws and Policies Are Authorized by Statute and Do Not Violate the Separation of Powers**

Plaintiff's Byrne JAG claims are also without merit. In Count One, plaintiff alleges that the four Byrne JAG conditions – as well as the requirement to provide information about the applicant's laws and policies – exceed the Department's statutory authority and intrude upon the powers of Congress. First Am. Compl. ¶¶ 101-16. As noted above, defendants reserve their arguments regarding the FY 2018 conditions that are similar to the FY 2017 conditions, pending resolution in the Ninth Circuit. With respect to the other conditions, an examination of the relevant statutes, with their framework and history, shows that the Assistant Attorney General for OJP possesses ample authority to impose the public disclosure condition and the grant application requirement. As described earlier, the AAG is authorized to place "special conditions on all grants," to determine "priority purposes for formula grants," 34 U.S.C. § 10102(a)(6), to "maintain liaison with . . . State governments in matters relating to criminal justice," *id.* § 10102(a)(2), and to require compliance with all "applicable Federal laws," *id.* § 10153(a)(5)(D). Imposition of these conditions fits comfortably within these authorities.

The history of 34 U.S.C. § 10102(a)(6) and the structure of the relevant statutes demonstrate that Congress has delegated such authority to OJP. Congress created the current version of the Byrne JAG Program in 2006, when the Reauthorization Act merged two earlier programs. Pub. L. No. 109-162, 119 Stat. 2960. Before the 2006 amendments, the relevant statute provided only that the AAG for OJP was authorized to "exercise such other powers and functions as may be vested in the [AAG] pursuant to this chapter or by delegation of the [AG]." See 42 U.S.C. § 3712(a)(6) (2005). In the Reauthorization Act, Congress expressly amended this

1 provision by inserting the words “including placing special conditions on all grants,  
2 and determining priority purposes for formula grants.” Pub. L. No. 109-162, §  
3 1152(b), 119 Stat. at 3113; *see* 34 U.S.C. § 10102(a)(6). And confirming this  
4 amendment’s plain text, a committee report accompanying the Act states unequi-  
5 vocally that the amendment would “allow[] the Assistant Attorney General to place  
6 special conditions on all grants and to determine priority purposes for formula  
7 grants.” H.R. Rep. No. 109-233, at 101 (2005).

8 Moreover, this authority clearly applies to the Byrne JAG Program. Section  
9 10102(a) sets forth the general duties and authorities of the AAG for OJP, and the  
10 Bureau of Justice Assistance, which directly administers the Byrne JAG Program,  
11 is part of OJP. By statute, the Director of the Bureau of Justice Assistance  
12 “report[s] to the Attorney General through the Assistant Attorney General [for  
13 OJP].” 34 U.S.C. § 10141(b); *see* OJP, *About Us*, <https://ojp.gov/about/about.htm>  
14 (OJP organizational chart) (last visited Nov. 13, 2018). Thus, the authority  
15 conferred on the AAG by Section 10102(a)(6) necessarily reaches all programs  
16 under his supervision, including the Byrne JAG Program.

17 Plaintiff’s claims fail to explain why Congress would have added the “special  
18 conditions” and “priority purposes” language, if not to confer the authority  
19 described. Another law *already* authorized the Attorney General to delegate the  
20 performance of his functions. *See* 28 U.S.C. § 510. Thus, plaintiff’s denial of this  
21 authority gives no practical effect to *either* the “special condition” *or* the “priority  
22 purpose” power – and directly contravenes the “well-known canon of statutory  
23 construction that, in general, a statute should not be construed so as to render a  
24 word or clause inoperative” *Bell v. Reno*, 218 F.3d 86, 91 (2d Cir. 2000); *see, e.g.,*  
25 *Johnson v. Consumerinfo.com, Inc.*, 745 F.3d 1019, 1022 (9th Cir. 2014) (“When  
26 Congress acts to amend a statute, we presume it intends its amendment to have real  
27 and substantial effect.”) (citation omitted).

28 Further, the independent authority to “determin[e] priority purposes for

1 formula grants” plainly reflects an intent to allow the AAG to exercise a degree of  
2 discretion over *formula* grants in particular. Such discretion must, if this language  
3 is to be afforded any meaningful legal effect, encompass at least the minimal  
4 authority to (1) articulate broad priorities for a given Fiscal Year’s grant program;  
5 (2) include, on program application forms, inquiries regarding the designated  
6 priority purpose; and (3) protect the confidentiality of related federal law enforce-  
7 ment information. In other words, the authority to “determine priority purposes”  
8 necessarily includes the authority to *prioritize* federal grant monies for those state  
9 and local jurisdictions that assist in furthering relevant federal *purposes*.  
10 Additionally, because states and localities would decline to participate in – and  
11 thus, effectively annul – the Byrne JAG Program were this authority invoked to  
12 impose unreasonable conditions, any arguable risk of overreach that might  
13 otherwise inhere in this authority has a built-in structural check.

14 Finally, plaintiff’s assertion that these conditions constitute prohibited  
15 “direction, supervision, and control” under 34 U.S.C. § 10228(a), discussed above,  
16 is further belied by Los Angeles’s acceptance of numerous other Byrne JAG  
17 conditions. Plaintiff’s Byrne JAG award for FY 2016, which the City accepted  
18 without challenge, imposed fifty-one “special conditions.” *See* RJN, Ex. A. The  
19 plaintiff agreed, for example, to refrain from certain specific actions related to  
20 human trafficking, including any “[a]cts that directly support or advance trafficking  
21 in persons,” *see id.*, Ex. A ¶ 6; to comply with Department regulations on civil  
22 rights and non-discrimination, including regulations prohibiting specific forms of  
23 discrimination on the basis of religion, *see id.*, Ex. A ¶ 13; to refrain from requiring  
24 employees to sign any “internal confidentiality agreement or statement that  
25 prohibits or otherwise restricts, or purports to prohibit or restrict, the reporting (in  
26 accordance with law) of waste, fraud, or abuse,” *see id.*, Ex. A ¶ 17; and to partici-  
27 pate in “training events, technical assistance events, or conferences” sponsored by  
28 OJPJ’s Bureau of Justice Assistance, *see id.*, Ex. A ¶ 33. If those conditions do not

1 constitute exercising “direction, supervision, and control” over grantees – as shown  
 2 by plaintiff’s own agreement to them – then neither do the immigration-related  
 3 conditions challenged here.

4 **B. The Public-Disclosure Condition and the Requirement**  
 5 **to Provide Information about Laws and Policies**  
 6 **Are Consistent with the Spending Clause**

7 In Count Two, plaintiff alleges that the challenged Byrne JAG conditions  
 8 violate the Spending Clause. First Am. Compl. ¶¶ 117-120. The above discussion  
 9 in relation to the Gang Suppression program establishes that these requirements  
 10 satisfy the ambiguity element of the Spending Clause. And, as set forth below, the  
 11 public-disclosure condition in the Byrne JAG Program and the requirement to  
 12 provide information about the grantee’s laws and policies also satisfy the  
 “relatedness” element of *Dole*.<sup>9</sup>

13 As noted already, the “relatedness” aspect of *Dole* does not pose a difficult  
 14 hurdle, and these conditions easily satisfy this permissive standard. The Byrne JAG  
 15 Program promotes “criminal justice” by supporting programs such as law enforce-  
 16 ment, prosecution, crime prevention, and corrections. 34 U.S.C. § 10152(a)(1).  
 17 The term “criminal justice” is defined broadly to include various activities of the  
 18 police, the courts, and “related agencies.” *Id.* § 10251(a)(1). Further, immigration  
 19 enforcement, which the conditions promote, undoubtedly intersects with the Byrne  
 20 JAG Program’s criminal justice purposes, at a minimum for the simple reason that a  
 21 conviction for any of a wide variety of criminal offenses renders an alien removable  
 22 from this country. *See* 8 U.S.C. § 1227(a)(2). Indeed, the term “criminal alien”  
 23 appears multiple times in the INA, and “[a] primary goal of several recent over-  
 24 hauls of the INA has been to ensure and expedite the removal of aliens convicted of  
 25 serious crimes.” 8 U.S.C. §§ 1226(c), 1228(a), 1231(a)(6), 1378; *Duvall v. Atty.*

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27 <sup>9</sup> The above discussion regarding the Gang Suppression conditions also  
 28 disposes of plaintiff’s allegation, in Count Three, that the Byrne JAG conditions  
 violate the Tenth Amendment.

1 *Gen. of U.S.*, 436 F.3d 382, 391 (3d Cir. 2006); *see Padilla v. Kentucky*, 559 U.S.  
 2 356, 360 (2010) (observing that “deportation or removal is now virtually inevitable  
 3 for a vast number of noncitizens convicted of crimes”) (citation omitted). Once  
 4 removed, a criminal alien who has committed a removable offense – for example,  
 5 an aggravated felony, domestic violence, child abuse, or certain firearm offenses –  
 6 is no longer present in this country with the potential to re-offend.

7 Thus, the challenged requirements ensure that any “program or activity”  
 8 funded by the Byrne JAG Program does not thwart the federal government’s  
 9 exercise of its ability to remove aliens not lawfully present in the United States or  
 10 removable due to a criminal conviction. *See Koslow v. Pennsylvania*, 302 F.3d  
 11 161, 176 (3d Cir. 2002) (observing that the challenged condition “govern[ed] only a  
 12 ‘program or activity’ receiving federal funds,” and noting that this limitation aided  
 13 in satisfying “the ‘relatedness’ requirement articulated in *Dole*”). Declining to fund  
 14 jurisdictions that disclose federal law enforcement information in an attempt to  
 15 hinder federal law enforcement is plainly related to the criminal-justice purposes of  
 16 the Byrne JAG Program.

#### 17 **IV. All of the Challenged Requirements Are Consistent with the** 18 **Administrative Procedure Act**

19 Finally, Counts Four and Eight of the First Amended Complaint allege that  
 20 the decision to impose the challenged requirements was arbitrary and capricious  
 21 under the Administrative Procedure Act (“APA”) “because DOJ imposed [the  
 22 challenged] conditions and certifications without any reasoned basis, provided no  
 23 support for its linkage between participation by State and local law enforcement  
 24 officials in federal civil immigration enforcement and . . . local criminal justice  
 25 efforts . . . and appears to have relied on clearly erroneous and debunked interpre-  
 26 tations of existing studies.” First Am. Compl. ¶ 131; *see id.* ¶ 161. These claims  
 27 are without merit.

28 As an initial matter, if the challenged requirements are statutorily authorized



1 and comport with the Spending Clause and the Tenth Amendment – which, as  
2 shown above, they do – it is unclear how “arbitrary or capricious” scrutiny could  
3 otherwise limit the Department’s broad discretion. Further, the Gang Suppression  
4 requirements are entirely unreviewable under the APA because that program is  
5 authorized by one-line appropriations that commit the parameters of the program  
6 “to agency discretion by law.” 5 U.S.C. § 701(a)(2); *see Lincoln*, 508 U.S. at 192;  
7 *International Union*, 746 F.2d at 861.

8 In any event, when a court reviews an agency’s action under the “arbitrary or  
9 capricious” standard, it is “required to be ‘highly deferential,’” and to “presum[e]  
10 the agency action to be valid” as long as it is supported by a rational basis.  
11 *Providence Yakima Med. Ctr. v. Sebelius*, 611 F.3d 1181, 1190 (9th Cir. 2010)  
12 (quoting *J & G Sales Ltd. v. Truscott*, 473 F.3d 1043, 1051 (9th Cir. 2007)). This  
13 standard of review is “narrow,” and does not authorize a district court “to substitute  
14 its judgment for that of the agency.” *Citizens to Preserve Overton Park, Inc. v.*  
15 *Volpe*, 401 U.S. 402, 416 (1971).

16 Here, plaintiff’s claims fail because “the agency’s reasons for” imposing the  
17 challenged requirements “were entirely rational.” *FCC v. Fox Television Stations,*  
18 *Inc.*, 556 U.S. 502, 517 (2009). Even assuming OJP’s imposition of the challenged  
19 requirements were subject to arbitrary-and-capricious review notwithstanding the  
20 absence of any statutory standards governing the choice of special conditions and  
21 priority purposes, it is reasonable for OJP to deny federal law enforcement funding  
22 to a jurisdiction that releases aliens whom the jurisdiction itself suspects of criminal  
23 conduct without allowing federal officials to interrogate or apprehend those aliens.  
24 That judgment does not depend on a factual determination of the sort that Los  
25 Angeles appears to demand. It simply requires asking whether OJP should blind  
26 itself to the degree of cooperation provided (or not provided) by localities to federal  
27 law enforcement efforts when distributing federal law enforcement grants, as well  
28



1 as to the public safety threats caused by that lack of cooperation. Thus, the chal-  
2 lenged requirements are “common-sense measures,” Admin. Record at AR00993,  
3 and “even in the absence of evidence, the agency’s predictive judgment (which  
4 merits deference) makes entire sense” as “an exercise in logic rather than  
5 clairvoyance.” *Fox Television*, 556 U.S. at 521.

6 In any event, the Administrative Record submitted by the defendants further  
7 supports the rationality of the conditions. Prompted partly by an Inspector General  
8 report describing deteriorating local cooperation with “efforts to remove undocu-  
9 mented criminal aliens from the United States,” Admin. Record at AR00366, the  
10 Department of Justice under the prior Administration instituted a requirement for  
11 FY 2016 Byrne JAG grantees to certify compliance with 8 U.S.C. § 1373 in order  
12 to protect the exchange of information among federal, state, and local law  
13 enforcement. *Id.* at AR00392-97. For the FY 2017 grant cycle, the Department  
14 maintained that condition and added conditions similar to the interview and custody  
15 conditions described above, to “increase[e] information sharing between federal,  
16 state, and local law enforcement” so that “federal immigration authorities have the  
17 information they need to enforce the law and keep our communities safe.” *Id.* at  
18 AR00993 (Backgrounder on Grant Requirements). The FY 2018 requirements  
19 challenged here responded to further developments, including, in relation to the  
20 public-disclosure requirement, at least one instance in which an elected local  
21 official publicly disclosed an impending federal law enforcement operation  
22 designed to apprehend suspected illegal aliens. *Id.* at AR01038-39. Further, the  
23 Gang Suppression solicitation specifically notes the Department’s focus on  
24 reducing transnational gang violence, Admin. Record at AR01485, and cooperation  
25 with DHS with respect to criminal aliens is an important feature of that focus.

26 Finally, as discussed above in relation to the Spending Clause, immigration  
27 enforcement undoubtedly relates to criminal justice. Numerous federal statutes  
28 expressly connect these two subjects. *See supra* text at 4-5. The challenged

requirements thus rationally promote interests in “maintain[ing] liaison” among tiers of government “in matters relating to criminal justice,” 34 U.S.C. § 10102(a)(2), and comport with the intergovernmental cooperation that Congress plainly contemplates in immigration enforcement. *See, e.g.*, 8 U.S.C. §§ 1226(d), 1357(g), 1373; *Arizona*, 567 U.S. at 411-12 (“Consultation between federal and state officials is an important feature of the immigration system” and Congress “has encouraged the sharing of information about possible immigration violations.”).

Accordingly, the challenged requirements are rational, and this Court should not “substitute its judgment” for that of the Department of Justice. *Citizens to Preserve Overton Park, Inc.*, 401 U.S. at 416.

#### **V. Plaintiff Does Not Meet the Requirements for Preliminary Relief**

The above discussion effectively disposes of plaintiff’s alternative motion for preliminary injunction, because likelihood of success on the merits is the “sine qua non” of preliminary relief. *See New Comm Wireless Servs., Inc. v. SprintCom, Inc.*, 287 F.3d 1, 9 (1st Cir. 2002), *quoted in Thomas v. Zachry*, 256 F. Supp. 3d 1114, 1118 (D. Nev. 2017). The other requirements for preliminary relief also favor the defendants. Defendants are already enjoined from using or enforcing most of the challenged conditions in the Byrne JAG Program, thus largely eliminating plaintiff’s claim of irreparable harm in relation to the only formula grant involved here. Los Angeles has received its FY 2018 Byrne JAG award. RJN, Ex. C. Encouraging cooperation between local and federal law enforcement officials promotes the public interest in executing federal laws that require the removal of criminal aliens, and tips the balance of equities decidedly toward the defendants. *Winter v. NRDC*, 555 U.S. 7, 20 (2008).

#### **VI. Any Injunction Should Be Limited to Los Angeles**

Finally, Los Angeles expressly seeks a permanent or preliminary injunction to benefit all Byrne JAG recipients “program-wide.” Pl’s Memo. at 24-25. Plaintiff lacks standing to seek such an injunction, however. As the Supreme Court has

1 observed many times, a plaintiff “must establish standing separately for each form of  
 2 relief sought,” *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017),  
 3 and a “plaintiff’s remedy must be limited to the inadequacy that produced [its] injury  
 4 in fact,” *Gill v. Whitford*, 138 S. Ct. 1916 (2018); see *City & Cty. of San Francisco v.*  
 5 *Trump*, 897 F.3d 1225, 1244-45 (9th Cir. 2018) (reversing grant of nationwide  
 6 injunction). Moreover, as an equitable matter, nationwide injunctions “take a toll on  
 7 the federal court system – preventing legal questions from percolating through the  
 8 federal courts, encouraging forum shopping, and making every case a national  
 9 emergency for the courts and for the Executive Branch.” *Trump v. Hawaii*, 138 S.  
 10 Ct. 2392, 2425 (2018) (Thomas, J., concurring); see *Virginia Soc’y for Human Life,*  
 11 *Inc. v. FEC*, 263 F.3d 379, 393 (4th Cir. 2001) (noting tendency of nationwide  
 12 injunctions to “thwart the development of important questions of law by freezing  
 13 the first final decision rendered on a particular legal issue”), *quoted in Los Angeles*  
 14 *Haven Hosp. v. Sebelius*, 638 F.3d 644, 664-65 (9th Cir. 2011). Indeed, many of  
 15 the issues presented herein are, in fact, pending in multiple other cases throughout  
 16 the country, *California v. Sessions*, No. 3:18-cv-05169-WHO (N.D. Cal.); *San*  
 17 *Francisco v. Sessions*, No. 3:18-cv-05146-WHO (N.D. Cal.); *Chicago v. Sessions*,  
 18 No. 1:18-cv-06859 (N.D. Ill.); *City of New York v. Sessions*, No. 1:18-cv-06474-ER  
 19 (S.D.N.Y.); *State of York v. Sessions*, No. 1:18-cv-06474 (S.D.N.Y.); *City of*  
 20 *Providence v. Sessions*, No. CA-18-437-JJM-LDA (D.R.I.), and a “program-wide”  
 21 injunction by this Court would risk conflicting with any orders entered by other  
 22 district courts. At minimum, therefore, if the Court were to enter a nationwide  
 23 injunction, its application beyond the plaintiff should be stayed pending appeal.

## 24 CONCLUSION

25 Accordingly, the Court should reject all of plaintiff’s claims regarding the FY  
 26 2018 Gang Suppression program and plaintiff’s challenges to the public-disclosure  
 27 condition in the FY 2018 Byrne JAG Program and the requirement to provide  
 28 information regarding the grantee’s laws and policies.

1 Dated: November 13, 2018  
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3

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